96TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 96-831
2d Session } { Part 1

CLASSIFIED INFORMATION CRIMINAL TRIAL PROCEDURES ACT

MARCH 18, 1980.—Ordered to be printed

Mr. BOLAND, from the Permanent Select Committee on Intelligence, submitted the following

REPORT

[To accompany H.R. 4736]

[To accompany H.R. 4736 which on July 11, 1979, was referred jointly to the Committee on the Judiciary and the Permanent Select Committee on Intelligence

The Permanent Select Committee on Intelligence, to whom was referred the bill (H.R. 4736) to establish certain pre-trial and trial procedures for the use of classified information in connection with Federal criminal cases, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill do pass.

AMENDMENT

Strike all after the enacting clause and insert in lieu thereof:

That this Act may be cited as the "Classified Information Criminal Trial Procedures Act".

TITLE I—PROCEDURES FOR DISCLOSURE OF CLASSIFIED INFORMATION IN CRIMINAL CASES

PRETRIAL CONFERENCES

SEC. 101. At any time after the filing by the United States of an indictment or information in a United States district court, any party to the case may request a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Upon such a request, the court shall promptly hold a pretrial conference to establish a schedule for any request for discovery of classified information and for the implementation of the procedures established by this title. In addition, at such a pretrial conference the court may consider any other matter which may promote a fair and expeditious trial. No admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.

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PROCEDURES FOR DISCLOSURE OF CLASSIFIED INFORMATION

SEC. 102. (a)(1) Whenever a defendant in any Federal prosecution intends to take any action to disclose or cause the disclosure of classified information in any manner in connection with such prosecution, the defendant shall, before such disclosure and before the trial or any pretrial hearing, notify the court and the attorney for the United States of such intention and shall not disclose or cause the disclosure of such information unless authorized to do so by the court in accordance with this title. Such notice shall include a brief description of the classified information that is the subject of such notice.

(2)(A) Within ten days of receiving a notification under paragraph (1), the United States, by written petition of the Attorney General, may request the court to conduct a proceeding to make all determinations concerning the use, relevance, or admissibility of the classified information at issue that would otherwise be made during the trial or a pretrial hearing. Upon such a request, the court shall conduct such a proceeding.

(B) Any proceeding held pursuant to a request under subparagraph (A) (or any portion of such proceeding specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.

(C) If a request for a proceeding under this subsection is not made within ten days or if, at the close of such a proceeding, the determination of the court regarding the use, relevance, or admissibility of the classified information at issue is favorable to the defendant, the court shall authorize the defendant to disclose or cause the disclosure of the classified information at the trial or at any pretrial hearing, but such disclosure may not be made before the time for the United States to appeal such determination under section 108 has expired. If the United States takes such an appeal, such disclosure may not be made until such appeal is decided.

(b)(1) Whenever a defendant in a Federal prosecution intends to take any action to disclose or cause the disclosure, during the trial or any pretrial hearing, of any classified information and the defendant has not given notice under subsection (a)(1) with respect to such disclosure because the interest of the defendant in such disclosure reasonably could not have been anticipated before the expiration of the time for giving such notice, the defendant shall, before taking such action, notify the court and the attorney for the United States of such intention and shall not disclose or cause the disclosure of such information unless authorized by the court to do so in accordance with this title. Such notice shall include a brief description of the classified information that is the subject of such notice.

(2)(A) Within forty-eight hours of the receipt of a notification under paragraph (1), the United States, by written petition of the Attorney General, may request the court to conduct a proceeding to make all determinaions concerning the use, relevance, or admissibility of the classified information at issue. Upon such a request, the court shall conduct such a proceeding.

(B) Any proceeding held pursuant to a request under subparagraph (A) (or any portion of such proceeding specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.

(C) If a request for a proceeding under this subsection is not made within forty-eight hours or if, at the close of such a proceeding, the determination of the court regarding the use, relevance, or admissibility of the classified information at issue is favorable to the defendant, the court, subject to the provisions of section 106, shall authorize the defendant to disclose or cause the disclosure of the classified information at the trial or any pretrial hearing, but such disclosure may not be made before the time for the United States to appeal such determination under section 108 has expired. If the United States takes such an appeal, such disclosure may not be made until such appeal is decided. In any order of the court under this subsection that is favorable to the defendant, the court shall specify the time to be allowed the United States to appeal such order under section 108.

(c)(1) At any time before or during trial the United States, by written petition of the Attorney General, may request the court to conduct a proceeding to make all determinations concerning the use, relevance, or admissibility of classi-

fied information which has not been the subject of notice under subsection (a) (1) or (b) (1). Upon such a request, the court shall conduct such a proceeding.

(2) Any proceeding held pursuant to a request under paragraph (1) (or any portion of such proceeding specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.

(3) If, at the close of a proceeding held pursuant to this subsection, the determination of the court regarding the use, relevance, or admissibility of the classified information at issue is favorable to the defendant, the court, subject to the provisions of section 106, shall authorize the defendant to disclose or cause the disclosure of the classified information at the trial or at any pretrail hearing, but such disclosure may not be made before the time for the United States to appeal such determination under section 108 has expired. If the United States takes such an appeal, such disclosure may not be made until such appeal is decided. In any order of the court under this subsection that is favorable to the defendant, the court shall specify the time to be allowed the United States to appeal such order under section 108.

(d) Upon receiving a request from the United States for a proceeding under subsection (a) (2), (b) (2), or (c) (1), the court shall issue an order prohibiting the defendant from disclosing or causing the disclosure of the classified information at issue pending conclusion of the proceeding.

(e) Before any proceeding is conducted pursuant to a request by the United States under subsection (a) (2), (b) (2), or (c) (1), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(f) During the examination of a witness by a defendant in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible in accordance with the procedures established by this title. Upon such an objection, the court shall take such action to determine whether the response is admissible as will safeguard against the disclosure of any classified information. Such action may include requiring the United States to provide the court with a proffer of the response of the witness to the question or line of inquiry anticipated by the United States and requiring the defendant to provide the court with a proffer of the nature of the information sought to be elicited.

ALTERNATIVE PROCEDURE FOR DISCLOSURE OF CLASSIFIED INFORMATION

SEC. 103. (a) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by section 102, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(1) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(2) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(b) The United States may, in connection with a motion under subsection (a), submit to the court an affidavit of the Attorney General certifying that disclosure of the classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

SEALING OF RECORDS OF IN CAMERA PROCEEDINGS

SEC. 104. If at the close of an in camera proceeding under this title (or any portion of a proceeding under this title that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or any pretrial hearing, the record of such in camera proceeding shall be sealed and preserved by the court for use in the event of an appeal.

PROHIBITION ON DISCLOSURE OF CLASSIFIED INFORMATION BY DEFENDANT, RELIEF FOR DEFENDANT WHEN UNITED STATES OPPOSES DISCLOSURE

SEC. 105. (a) Whenever the court denies a motion by the United States that it issue an order under section 103(a) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(b) Whenever a defendant is prevented by an order under subsection (a) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include—

(1) dismissing specified counts of the indictment or information:

(2) finding against the United States on any issue as to which the excluded classified information relates; or

(3) striking or precluding all or part of the testimony of a witness.

FAILURE OF DEFENDANT TO PROVIDE PRETRIAL NOTICE

SEC. 106. If a defendant fails to comply with the notice requirements of subsection (a) or (b) of section 102 and the court finds that the defendant's need to disclose or cause the disclosure of the classified information at issue reasonably could have been anticipated before the expiration of the time for giving such notice under such subsection, the court may prohibit the defendant from disclosing or causing the disclosure of such classified information during trial and may prohibit the examination by the defendant of any witness with respect to any such information.

RECIPROCITY; DISCLSURE BY THE UNITED STATES OF REBUTTAL EVIDENCE

SEC. 107. (a) Whenever the court determines, in accordance with the procedures prescribed in section 102, that classified information may be disclosed in connection with a criminal trial or pretrial hearing or issues an order pursuant to section 103(a), the court shall—

(1) order the United States to provide the defendant with the information it expects to use to rebut the particular classified information at issue; and

(2) order the United States to provide the defendant with the name and address of any witness it expects to use to rebut the particular classified information at issue if, taking into account the nature and extent of the defendant's disclosures, the probability of harm to or intimidation or bribery of a witness, and the probability of identifiable harm to the national security, the court determines that such order is appropriate.

(b) If the United States fails to comply with an order under subsection (a), the court, unless it finds that the use at trial of information or a witness reasonably could not have been anticipated, may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

(c) Whenever the United States requests a pretrial proceeding under section 102, the United States, upon request of the defendant, shall provide the defendant with a bill of particulars as to the portions of the indictment or information which the defendant identifies as related to the classified information at issue in the pretrial proceeding. The bill of particulars shall be provided before such proceeding.

(d) The provisions of this section shall not apply to classified information provided by the United States to the defendant pursuant to a discovery request, unless the court determines that the interests of fairness so require.

APPEALS BY THE UNITED STATES

SEC. 108. (a) The United States may appeal to a court of appeals before or during trial from any decision or order of a district court in a criminal case requiring or authorizing the production, disclosure, or use of classified information, imposing sanctions for nondisclosure of classified information, or denying the issuance of a protective order sought by the United States to prevent the disclosure of classified information, if the Attorney General certifies to the district court that the appeal is not taken for purpose of delay.

(b)(1) If an appeal under this section is taken before the trial has begun, the appeal shall be taken within ten days after the date of the decision or order appealed from, and the trial shall not commence until the appeal is decided.

(2) If an appeal under this section is taken during the trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals (A) shall hear argument on such appeal within four days of the adjournment of the trial, (B) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (C) shall render its decision within four days of argument on appeal, and (D) may dispense with the issuance of a written opinion in rendering its decision.

(c) Any appeal and decision under this section shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

PROTECTIVE ORDERS; DISCOVERY; INTRODUCTION OF EVIDENCE

SEC. 109. (a) Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

(b) Whenever the court determines pursuant to rule 16 of the Federal Rules of Criminal Procedure that the defendant is entitled to discover or inspect documents or materials containing classified information, the court shall authorize the United States to delete classified information from the documents or materials to be made available to the defendant, to substitute a summary of the classified information, or to substitute a statement admitting relevant facts that the classified information would tend to prove, if the court finds that such action will provide the defendant with substantially the same ability to prepare for trial or make his defense as would disclosure of the specific classified information. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(c) Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(d) When a writing or recorded statement (or a part thereof) is introduced into evidence by the United States, the court, upon motion of the defendant, may require the United States at that time to introduce any other writing or recorded statement (or any other part of the statement introduced) which ought in fairness to be considered contemporaneously with the statement introduced and which is relevant to the defendant's case. If such other writing or recorded statement, or such other part, contains classified information, the court, at the request of the United States, shall conduct the hearing on the defendant's motion in camera. If, at the conclusion of such hearing, the court requires the United States to introduce classified information, the procedures of section 103 shall apply.

(e) The United States may notify the court and the defendant before trial if it intends to introduce during the trial only a part of a writing or recorded statement containing classified information. Upon such notification, the court shall conduct, before the trial, an in camera proceeding to make the determinations required by section 109(d).

SECURITY PROCEDURES

SEC. 110. (a) Within one hundred and twenty days of the date of the enactment of this Act, the Chief Justice of the United States, in consultation with the Attorney General and the Director of Central Intelligence, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any

classified information in the custody of the United States district courts, courts of appeals, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

(b) Until such time as rules under subsection (a) first become effective, the Federal courts shall in each case involving classified information adopt procedures to protect against the unauthorized disclosure of such information.

IDENTIFICATION OF INFORMATION RELATED TO THE NATIONAL DEFENSE

SEC. 111. In any prosecution in which the United States must establish as an element of the offense that material relates to the national defense or constitutes classified information, the United States shall notify the defendant, at the time of the pretrial conference or, if no such conference is held, at a time before trial specified by the court, of the portions of the material that it reasonably expects to rely upon to establish such element of the offense.

FUNCTIONS OF ATTORNEY GENERAL MAY BE EXERCISED BY DEPUTY ATTORNEY GENERAL AND A DESIGNATED ASSISTANT ATTORNEY GENERAL

SEC. 112. The functions and duties of the Attorney General under this title may be exercised by the Deputy Attorney General and by an Assistant Attorney General designated by the Attorney General for such purpose and may not be delegated to any other official.

DEFINITION

SEC. 113. As used in this title, the term "classified information" means information or material that is designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as information requiring a specific degree of protection against unauthorized disclosure for reasons of national security or any Restricted Data, as defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

TITLE II—GUIDELINES AND REPORTS

GUIDELINES PRESCRIBED BY THE ATTORNEY GENERAL

SEC. 201. Within ninety days of the date of the enactment of this Act, the Attorney General shall issue guidelines specifying the factors to be used by the Department of Justice in deciding whether to prosecute a violation of Federal law in which there is a possibility that classified information will be disclosed. Such guidelines shall be promptly transmitted to the appropriate committees of the Congress.

ANNUAL REPORT TO CONGRESS BY THE ATTORNEY GENERAL

SEC. 202. The Attorney General shall report to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives once each year concerning the operation and effectiveness of this Act. Such report shall include summaries of those cases in which a decision not to prosecute or not to continue a prosecution was made because of the possibility that classified information would be disclosed.

TITLE III—EFFECTIVE DATE

SEC. 301. The provisions of this Act shall become effective upon the date of the enactment of this Act, but shall not apply to any prosecution in which an indictment or information was filed before such date.

INTRODUCTION

The past few years have witnessed a significant increase in the number of criminal cases in which the use or disclosure of classified information has become an issue. These cases are not confined to any particular area of alleged illegal activity: the crimes involved have

included espionage, murder, perjury, narcotics distribution, burglary, and civil rights violations, among others. The new Foreign Corrupt Practices Act provisions and the possible enactment of a charter for intelligence activities can be expected to expand the number of cases presenting classified information problems.

The term "graymail" is now commonly used to describe such problems. Specifically, the term refers to the actions of a criminal defendant in seeking access to, revealing, or threatening to reveal classified information in connection with his defense. "Graymail" should not be viewed only as an unscrupulous or questionable defense tactic. In many instances, the defendant will simply be exercising his legal rights, as in seeking to use or introduce information or material which, though classified, is relevant to his defense.

Whatever the motivation, the government, which has the responsibility of both enforcing the law and protecting national security information, is faced with a perilous predicament—known as the "disclose or dismiss dilemma". In the past, pre-indictment or pre-trial talks between the Justice Department and the affected intelligence agency as to what classified information will be released for trial have tended to resemble hostile negotiations between warring parties rather than discussions among those on the same side. This is, or was, the unfortunate but predictable result of circumstances in which the government can only guess as to what classified information will be revealed in a trial. As former CIA General Counsel Anthony Lapham has noted:

> When you embark on one of these prosecutions, you are buying a ticket to go down a very long and difficult road, and at that moment you really can only see the first few feet of the way. You do not know what lies beyond. You do not know how the case is going to be defended. You do not know what discovery will be directed against you or how far it will be allowed by the judge, or under what conditions it will be allowed. You do not know what rulings the judge is going to make or even what issues he will have to rule on. Much of that is unknowable and unforseeable when these cases begin.
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> You can say that the Government always has the ultimate trump in these situations because if the disclosure demands mount up too high and if the going gets too tough, you can always back out. The prosecution can always be dismissed. But I want to assure you it is not that simple because these cases, once they are started, tend to develop a great deal of momentum. Some are very, very important cases in which the interest in success is very high and compelling, and it always seems when you have started on this course that it is better, more prudent, to give up the one additional piece of information that is being asked, hoping that that will end it rather than quit the whole process. Plus, if you ever play that trump and back out of one of these things, you have to understand that at that point there will develop a very considerable pressure to understand why it happened. The press will want to know if the case goes down for national security reasons,

> what the reason was, and they will scan around looking for the particular reason, and indeed, by backing away, you can very well achieve what you are trying to avoid, which is more highlighting on your problem and enhanced likelihood that the information will come out through another channel.[1]

Assistant Attorney General Philip Heymann has also put the matter succinctly:

> To fully understand the problem, it is necessary to examine the decision making process in criminal cases involving classified information. Under present procedures, decisions regarding the relevance and admissibility of evidence are normally made as they arise during the course of the trial. In advance of trial, the government often must guess whether the defendant will seek to disclose certain classified information and speculate whether it will be found admissible if objected to at trial. In addition, there is a question whether material will be disclosed at trial and the damage inflicted before a ruling on the use of the information can be obtained. The situation is further complicated in cases where the government expects to disclose some classified items in presenting its case. Without a procedure for pre-trial rulings on the disclosure of classified information, the deck is stacked against proceeding with these cases because all of the sensitive items that might be disclosed at trial must be weighed in assessing whether the prosecution is sufficiently important to incur the national security risks.
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> In the past, the government has foregone prosecution of conduct it believed to violate criminal laws in order to avoid compromising national security information. The costs of such decisions go beyond the failure to redress particular instances of illegal conduct. Such determinations foster the perception that government officials and private persons with access to military or technological secrets have a broad de facto immunity from prosecution for a variety of crimes. This perception not only undermines the public's confidence in the fair administration of criminal justice but it also promotes concern that there is no effective check against improper conduct by members of our intelligence agencies.[2]

A recent example of the disclose or dismiss dilemma in operation, the ITT/Chile Case,[3] is instructive. In 1978 two high officials of International Telephone and Telegraph (ITT) were charged with perjury and other crimes based on allegations that they lied when testifying before the Senate Foreign Relations Subcommittee on Multinational Corporations in 1973. The Subcommittee was investigating alleged ITT involvement in Chilean domestic political activities in 1970.

During the course of pre-trial proceedings and discussions, the government was informed that the defendants, in order to prove that the

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[1] "Espionage Laws and Leaks," hearings before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 96th Congress, 1st Session, January 24, 25, 31, 1979, pp. 52–53.

[2] "Graymail Legislation," hearings before the Subcommittee on Legislation of the Permanent Select Committee on Intell'gence, House of Representatives, 96th Congress, 1st Session, August 7, September 20, 1979, pp. 4–5.

[3] *U.S.* v. *Berrellez*, (D.D.C. Crim. No. 78–120) ; *U.S.* v. *Gerrity*, (D.D.C. Crim. No. 78–121). For purposes of this discussion, since the issues in both cases were the same, the two cases are treated as if they were joined for trial. In fact, they were not and the *Gerrity* dismissal came after the *Berrellez* dismissal.

alleged perjury testimony was given at the request of United States government officials, intended to offer classified information into evidence.

If usual procedures were to be followed, the determination of the admissibility of such information would be made during the course of the trial, with the likelihood that a good deal of the classified information would be disclosed before the admissibility ruling was made.

Accordingly, the government asked the trial judge to conduct an *in camera* pre-trial proceeding in which the defense would have been required to state in advance what classified information was part of its case and the admissibility of such information would then have been determined. In particular, the government moved for a protective order that would have required the defense to give notice before disclosing any information coming within four particular categories of information. In response:

> The district judge denied the government's motion for a protective order establishing a procedure for advance notice and a pre-disclosure determination of relevance. In response to the government's proposed procedures, Judge Robinson agreed to hold a conference prior to the opening argument at which counsel for Berrellez would be required to proffer the defenses he intended to raise in his opening statement. In addition, the judge stated that he might be willing, after such a conference, to issue "some form of protective order" precluding the defense from bringing out particular items that the judge had determined to be irrelevant and hence inadmissible. However, expressing grave doubts as to the propriety of ruling otherwise, he denied the government's request for a prospective procedure, that would apply to specified categories of national security information and would require, at every stage of trial, advance notice and a preliminary relevance determination for items coming within the specified categories. Instead, Judge Robinson indicated that he would neither depart from the normal trial sequence of question-by-question objection nor approach this case differently from other criminal cases because of the risk of disclosure of sensitive national security information.[4]

The government then petitioned the United States Court of Appeals for the D.C. Circuit to issue a Writ of Mandamus directing the district court to accede to the government's request. The Court of Appeals denied the petition in a one paragraph memorandum.[5] The government then sought and was granted permission to dismiss the indictment. A New York Times article the following day contained questions touching on all aspects of the graymail problem.[6] The article quotes the prosecutor as stating to the trial judge, "because of national security, we can't proceed". The author of the article states: "However, since the government refuses to throw more light on what secrets are being protected, there has been speculation that the information might merely be more embarrassing than vital to security . . .". The Chairman of the Senate Subcommittee before

[4] *In Re United States of America,* (D.C. Cir. No. 78–2158), petition for Writ of Mandamus, 7–8, citations omitted.
[5] *In Re United States of America,* (D.C. Cir. No. 78–2158) January 26, 1979.
[6] Charles Mohr, *New York Times,* p. A1, February 9, 1979.

which the alleged perjury was committed stated that the decision to dismiss was "outrageous" and based on "spurious" grounds. Finally, one of the defense attorneys stated that it was not a case of graymail at all, noting that "we had information that was relevant to a legitimate defense."

The experience of this and other less publicized cases has led the Department of Justice (and the Committee) to conclude that "only by establishing a uniform set of procedures for resolving classified information issues prior to trial can the speculation and irrationality be removed from the present system." [7]

H.R. 4736, as amended, establishes these procedures. It does so in a manner fully protective of the defendant's rights, utilizing techniques employed by courts on an *ad hoc* basis many times in the past.[8]

The procedures are designed to give the government advance notice of what classified information will be admissible during trial; they are not designed to effect the admissibility determination itself. With advance notice, the guesswork, suspense, and fear will be removed from the decisionmaking process, and the government can make a reasoned determination as to whether to proceed with a prosecution.

HISTORY OF THE BILL

On January 24, 25, and 31, 1979, the Subcommittee on Legislation conducted hearings on a wide variety of subjects connected with the unauthorized disclosure of classified information.

A significant portion of the hearings focused on the use of classified information in criminal litigation, a subject of concern to the Committee since its inception in July, 1977, known by the shorthand term "graymail".

The result of the hearings was a lengthy period of detailed and productive discussion among the Committee, its counterpart in the other body, the Department of Justice, the defense bar, and other interested groups. What emerged was a general bipartisan agreement that the graymail phenomenon was producing a debilitating effect on the administration of justice and that a legislative response was necessary. After many additional hours of drafting sessions, general agreement was reached on the contents of such legislation. The result was the introduction, on July 11, 1979, of three substantially similar bills: H.R. 4736, the Intelligence Committee bill; H.R. 4745, the Administration bill; and S. 1482, the Senate bill.

Though differing in detail, each of these bills contained the three provisions necessary to any solution of the graymail problem:

Pre-trial notice by the defendant of the intent to use classified information;

Pre-trial, *in camera* determination of the admissability of classified information;

Interlocutory appeal by the government of any adverse ruling regarding the disclosure of classified information.

The two House bills became the subject of further hearings held by the Subcommittee on Legislation on August 7 and September 20, 1979.

[7] Assistant Attorney General Philip Heymann, Graymail hearings, p. 5.

[8] Phillip Lacovara, former Deputy Solicitor General and assistant Watergate special prosecutor, has stated, "Few of the issues that are proposed in either of these bills is wholly new or radical. What we have here is a synthesis of techniques that are currently availab'e to federal judges if only they had some consistent approach and some incentive to go at the process in this way." Graymail Hearings, p. 112.

The Subcommittee heard from 11 witnesses representing a wide variety of interests:

Mr. Philip B. Heymann, Assistant Attorney General, Criminal Division, Department of Justice

Ms. Deanne Siemer, General Counsel, Department of Defense

Mr. Morton Halperin, Director, Center for National Security Studies (representing the American Civil Liberties Union)

Michael Tigar, Esq., defense counsel in several espionage cases

Michael G. Scheininger, Esq., former Assistant U.S. Attorney and co-counsel for the defense in the ITT/Chile case

Thomas A. Guidoboni, Esq., formerly of the District of Columbia Public Defender Service

Phillip Lacovara, Esq., former Deputy Solicitor General and Assistant Special Prosecutor for the "Watergate" case

William Greenhalgh, Esq., professor of law, Georgetown University Law Center

Otto Obermaier, Esq., representing the Association of the Bar of the City of New York

Daniel Silver, Esq., General Counsel, Central Intelligence Agency

Anthony A. Lapham, Esq., former General Counsel, Central Intelligence Agency

On January 29, 1979, the Subcommittee on Legislation, using H.R. 4736 as a vehicle, met in a markup session and, by a vote of 4–0, favorably reported the legislation, as amended, to the full Committee.

On February 12, 1979, the full Committee met to consider the legislation, made further amendment thereto, and, a quorum being present, by unanimous voice vote ordered the bill, as amended, reported to the House.

SUMMARY OF LEGISLATION

H.R. 4736, as reported, establishes a uniform procedural mechanism under which, in so far as is possible, the government will be made aware prior to trial of what classified information must be disclosed during trial, so that it can make an informed and reasoned decision on whether the interests in proceeding with the prosecution outweigh the possible harm resulting from disclosing classified information.

The bill does not alter the existing rules or standards for making the substantive determination of whether particular information is admissible in a criminal trial.

The bill requires the defense, whenever it intends to use classified information during trial, to so notify the government prior to trial. The government can then obtain an *in camera* adversary proceeding in which the admissibility of the information will be determined—according to the usual rules of evidence.

If the defense could not have reasonably anticipated before trial the need to use classified information during trial, and the court so finds, the classified information still may be used in trial, but advance notice must be given to the government so that admissibility may be determined *in camera* before the classified information is disclosed.

The bill further provides that after an advance determination is made, pre-trial or during trial, that specific classified information is admissible, the court may order the introduction of only a summary of

it, or a statement admitting facts the information tends to prove—if the court finds that the summary or statement will provide the defendant with substantially the same ability to make a defense as would disclosure of the specific information.

If the court finds that the statement or summary will not be adequate, and the government objects to disclosure of the information, the judge must order the defendant not to disclose it. The result will be dismissal of the case, unless some lesser remedy, such as dismissal of a count, admission of facts, or striking of testimony is appropriate.

The bill authorize the government to appeal, before or during trial, all rulings of the trial court pertaining to the admissibility or disclosure of classified information, and provides that such appeals shall be expedited by the Courts of Appeal.

Whenever the defense has been required to disclose part of its case in advance, and the classified evidence it wants to rely on is found admissible, the government is required to reciprocate and disclose, in advance of trial, the information it will use to rebut the classified information. Depending on the circumstances, the government also may be required to disclose the identities of witnesses it will call to counter the classified information. However, if the information given up by the defendant was originally obtained by the defendant from the government through discovery, all reciprocity is within the court's discretion.

The bill allows the government to have classified information admitted into evidence without declassifying it and to have determined in advance whether it will be permitted to introduce only a part of a written or recorded statement.

Title II of the bill requires the Attorney General to promulgate guidelines pursuant to which the Justice Department must make proscutorial decisions involving national security considerations. It also requires the Attorney General to report annually to Congress on the bill's operation and on cases in which decisions not to prosecute were made for reasons of national security.

Title III makes the bill effective upon enactment except as to those cases pending at the time of enactment.

SECTION BY-SECTION ANALYSIS

Section 101

This section is based on a similar provision which is to be found in Rule 17.1 of the Federal Rules of Criminal Procedure. Rule 17.1 authorizes the court, upon request of either party or on its own motion, to call a pre-trial conference "to consider such matters as will promote a fair and expeditious trial."

Section 101 is intended to supplement this provision in those instances in which classified information will be involved in a criminal trial, in order to insure that issues involving such information are identified as soon as possible and addressed pursuant to a pre-determined schedule. Upon the request of either party, the court must hold a pre-trial conference for the purpose of setting a schedule for the discovery of classified information. In addition, where the bill prescribes no schedule, the court is to set a schedule for compliance with

those provisions of the bill, such as sections 102(a)(1), 102(b)(1), 102(e), and 107, requiring a party to disclose information or to give advance notice of particular actions. No admissions made by the defendant or a defense attorney at a pre-trial conference may be used against the defendant unless reduced to writing and signed by both.

Section 101 also provides that the "court may consider any other matter which may promote a fair and expeditious trial." This language, taken from Rule 17.1, is intended to authorize the court, where appropriate, to avoid multiple pre-trial conferences. Thus, assuming proper security precautions, the procedural and scheduling matters relating to the use of classified information encompassed by section 101 may be dealt with as part of a Rule 17.1 pre-trial conference. It is to be emphasized, however, that no substantive issues concerning the admissibility of classified information are to be decided in a "pre-trial conference". Rather, the bill requires such issues to be decided, upon government request, at the *in camera* "proceedings", held before or during trial, which are authorized by section 102.

Section 102

Section 102 contains the notice and hearing provisions which are at the heart of the bill's attempt to insure, as much as is practicable, that the government knows before trial what classified information will be disclosed during trial. The essential prerequisite for such assurance is the requirement that the defendant notify the government prior to trial of any intent to disclose or cause the disclosure of classified information during trial.

(*a*) *Pre-Trial Notice*

Section 102(a)(1) requires the defense to notify the court and the government, prior to trial, of any intent to disclose or cause the disclosure of classified information during trial (or during a pre-trial hearing [9]). Such disclosure might come about during opening argument, in connection with the introduction of exhibits and/or evidence, when government or defense witnesses are being questioned, during closing argument, or in numerous other ways.

Once notice is given, the defense cannot disclose the classified information until authorized to do so by the court.

The Committee wishes to emphasize that neither the language of section 102(a)(1) concerning the prohibition on disclosure (nor the court order provisions of sections 102(d) and 105(a)) are in any way intended to be the basis for any proposed expansion or reinterpretation of the law of prior restraint, and section 102(a)(1) is not, in fact, intended to be a prior restraint provision at all. Rather, consistent with constitutional provisions, its aim is to prevent the needless disclosure of classified information by maintaining the status quo until the government has had an opportunity to avail itself of the provisions of the bill. The intent is to leave the law of prior restraint undisturbed. It has been held that the trial court has broad discretion in prohibiting disclosure by the defendant of information obtained by the defendant through use of the court's processes, such as through discovery.[10] A

[9] E.g., a hearing on a motion to suppress evidence.

[10] See *In Re Adele Halkin*, 598 F. 2d 176 (D.C. Cir. 1979), esp. dissenting opinion of circuit Judge Wilkey; *Rogers v. U.S. Steel Corporation*, 536 F. 2d 1001 (3rd Cir. 1976); *International Products Corporation v. Koons*, 325 F. 2d 403 (2nd Cir. 1963).

prohibition in this area can extend to out-of-court disclosures and to post-trial disclosures. The court's authority is narrower where the information at issue was in the possession of the defendant before the trial began and was not obtained by the defendant with the aid of the court. In this area, the court's authority to prohibit disclosure extends only to a regulation of what may be said or introduced in the trial context.

Sections 102(a)(2)(A)&(B) require the court, upon the request of the government, to conduct a pre-trial adversary proceeding to determine the admissibility of the classified information which has been the subject of the defendant's notice.

The request for such a proceeding must be made within 10 days of receipt of a paragraph (1) notice, and must be made by the Attorney General in writing. (For purposes of Title I, "Attorney General" can also mean the Deputy Attorney General or a predesignated Assistant Attorney General. See section 112.) The proceeding, or portions thereof, must be held *in camera* if the Attorney General certifies that a public proceeding may result in the disclosure of classified information. While it is the Committee's hope that the government will present its arguments in a manner that will result in public proceedings whenever feasible, the Committee recognizes that in order to obtain a full development of the legal arguments, it often will be necessary to present them in a closed setting.

Some commentators have expressed concern because these provisions permit the government to obtain the pre-trial proceeding merely upon request, with no showing of any kind required. The corresponding provision of the Administration sponsored bill, H.R. 4745, which requires the government to prove to the court that the information is properly classified before obtaining an *in camera*, pre-trial proceeding, is seen by some as preferable on the theory that it insures that the government will not abuse the new provisions and seek pre-trial proceedings merely to obtain discovery or to harass the defendant.

The Committee is aware of the potential for abuse. However, it is felt that requiring a very senior Justice Department official to personally petition the court for a proceeding is a sufficient safeguard. More importantly, permitting the government to obtain a section 102 proceeding upon request will obviate the need for the government to make any national security argument before the admissibility determination is made, thus insuring that in making such determination the court will focus on the legal significance of the information, not on the national security significance of the information.[11]

It is the Committee's intent that the existing standards of use, relevance, and/or admissibility of information or materials in criminal trials not be affected by H.R. 4736. The words "make all determinations concerning the use, relevance, or admissibility of the classified information at issue that would otherwise be made during the trial

[11] Arguments as to the national security sensitivity of the information at issue will be appropriate once the information has been determined to be admissible and the court turns to the possibility of alternative disclosure under section 103.

or pre-trial hearing" which appear in section 102(a)(2)(A), were carefully chosen to reflect this intent.[12]

Section 102(a)(2)(C) directs the court to authorize the defendant, subject to the government's right of appeal, to disclose the classified information at the trial or at a pre-trial hearing if (1) the government has not requested a proceeding within 10 days of the defendant's notice, or (2) if, at such a proceeding, the court rules in the defendant's favor. Such a ruling is immediately appealable by the government under section 108.

(b) In-Trial Notice

Section 102(a), discussed above, establishes procedures under which the defendant must give pre-trial notice of an intent to disclose classified information during trial so that the admissibility of such information can be determined prior to trial. Section 102(b), on the other hand, applies once the trial has begun and the defendant wants to disclose or cause the disclosure of classified information which has not been the subject of a pre-trial notice and a pre-trial admissibility ruling.

While it is the intent of the legislation that most issues involving classified information be decided pre-trial, the Committee recognizes that instances will arise when the defendant, although he has not given pre-trial notice, should be permitted to use or disclose classified information during trial. However, in such cases, the government should still have an opportunity to make an admissibility challenge before the information is publicly disclosed.

Section 102(b)(1) requires the defendant, once the trial has begun, to notify the court and the government before disclosing classified information which has not been the subject of pre-trial notice.

Once notice is given the defendant, as in section 102(a), cannot disclose the information without being authorized to do so by the court.

Sections 102(b)(2)(A), (B), and (C) permit the government (upon written petition of the Attorney General) to ask for a proceeding to determine the use, relevance, or admissibility of the classified information and directs the court to conduct such a proceeding upon request and to hold it *in camera* upon government petition. If the

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[12] In this regard the Committee notes that it is well-settled that the common law state secrets privilege is not applicable in the criminal arena. To require, as some have suggested, that a criminal defendant meet a higher standard of admissibility when classified information is at issue might well offend against this principle. See *Reynold* v. *U.S.* 345 U.S. 1 (1953); *U.S.* v. *Andolschek*, 142 F. 2d 503 (2nd Cir. 1944); *U.S.* v. *Coplon*, 185 F. 2d 629 (1950). In *Reynolds*, a tort action against the government, the Supreme Court noted: "Respondents have cited to us those cases in the criminal field, where it has been held that the government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake a prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." (at 12, footnotes omitted). In *Coplon*, Learned Hand wrote: "In *United States* v. *Andolschek* we held that, when the government chose to prosecute an individual for a crime, it was not free to deny him the right to meet the case against him by introducing relevant documents, otherwise privileged. We said that the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defense." (at 638, footnotes omitted).

government has not requested a proceeding within 48 hours of defense notification or if, at such a proceeding, the court rules in the defendant's favor, the court must authorize the defendant, subject to the government's right to appeal, to disclose the classified information. As in subsection (a), the court's determinations are to be based on the existing rules of evidence regarding use, relevance, and admissibility. However, the court's ultimate decisions must take into account the requirements of section 106. Section 106 states that the court may prohibit the defendant from disclosing or causing the disclosure of classified information during trial if pre-trial notice has not been given and "the defendant's need to disclose or cause the disclosure of the classified information at issue reasonably could have been anticipated . . .".

(*c*) *Government Triggered Proceeding*

Under subsection (a), which applies pre-trial, and subsection (b), which applies during trial, the *in camera* proceeding to determine the admissibility of classified information is triggered by a defense notice to the government and to the court. However, if the government's authority was limited to responding to defense notice, it would not have the opportunity to obtain a pre-trial or pre-disclosure decision on all of the classified information questions that might cause it to abandon the prosecution. For example, the defense might not be aware that information in its possession is classified, may be trying to avoid the strictures of the disclosure provisions, or may not realize the relevance of the classified information to defense theories—and so will not give notice. However, if the government learns or believes that classified information will be disclosed, or simply wants to insure that certain classified information is not disclosed, it should be afforded the opportunity to obtain an advance determination of relevance and/or admissibility. This opportunity is provided by subsection (c).

Section 102(c)(1) enables the government, upon written petition of the Attorney General, to obtain a proceeding pre-trial or during trial to determine in advance the admissibility of classified information which has not been the subject of a defense notice.

Section 102(c)(2) requires the court to conduct such a proceeding *in camera* upon the certification of the Attorney General.

Section 102(c)(3) is substantially similar to section 102(a)(2)(C) and section 102(b)(2)(C). It directs the court to authorize the defendant to disclose the classified information upon a favorable admissibility ruling, subject to the government's right of appeal and the strictures of section 106.

(*d*) *Non-Disclosure Order*

This subsection directs the court, if the government has requested a proceeding under sections 102 (a)(2), (b)(2), or (c)(1), to order the defendant not to disclose the classified information at issue pending conclusion of the proceeding. For subsections (a) and (b), the court order will enable the prohibitions on disclosure contained therein to be enforced; for subsection (c), in which the government is taking the initiative, the court order is the sole means of insuring non-disclosure pending an admissibility determination.

It is to be emphasized that the discussion concerning prior restraints which accompanies section 101(a)(1) is equally applicable to section 102(d). No change of the law in this area is intended.

(*e*) *Identification of Information at Issue*

This subsection is intended to focus the parties on the particular classified information which is to be at issue in the pre-trial or in-trial proceedings authorized by the previous sections.

Whenever the government requests such a proceding, it must give notice to the defendant of what classified information is to be at issue. In most cases, the classified information the defense wants to use at trial will have been provided to the defendant by the government in the first place, through the discovery process. If so, the government's notice must identify the specific classified information at issue. In other cases, the defense might come into the prosecution possessed of classified information, would give notice of an intent to disclose it, and the government—without confirming its authenticity or accuracy—will want to challenge its relevance. In still other cases, the government, as is authorized by subsection (c), will seek a pre-trial proceeding to preempt defense use of classified information which was not obtained through discovery. In the latter two categories—where the government has not previously made the information available to the defendant in connection with the prosecution—the government, in giving notice of what information will be at issue, may describe the information by generic category, in such form as the court may approve, rather than identify the specific information of concern.

Absent the "generic category" notice option, the government might face a dilemma in which it must either (1) compromise classified secrets by providing the defendant with information of which he may have had no previous knowledge or confirm information that the defendant did not know was accurate or (2) fail to obtain a pre-trial ruling on the information and risk public exposure of the information at trial.

The "generic category" notice procedure is intended to provide a means of resolving this dilemma. Under this procedure, the government could obtain a hearing on matters not "noticed" by the defendant without being required to expand the defendant's knowledge of sensitive classified matters. The operation of this procedure can be illustrated by the approach the government attempted to employ in the *ITT/Chile* case in the United States District Court for the District of Columbia.[13] In that case, the government moved for an order that would have required the defendant to give notice before disclosing any information coming within four generic categories. Those categories were (1) the past or present location of any CIA station, base, installation, or facility, except for Langley, Virginia, Buenos Aires, Argentina, Santiago, Chile, or Miami, Florida; (2) the presence of any CIA officer or employee in any location except for Langley, Virginia. Buenos Aires, Argentina, Santiago, Chile, or Miami, Florida; (3) the past or present relationship and/or communications between any Chilean and the CIA or any officer or employee thereof; and (4) the identity of any CIA source or contact other than an ITT official.

Assume, for example, that "Ms. A" was a CIA contact or source and the government wanted to avoid disclosure of that fact at trial. Under H.R. 4736, if the defendant did not include that fact in a notice to the government, the government could obtain a hearing either by providing notice that it wanted a pre-trial determination of whether the status of Ms. A as a CIA source was admissible at trial or by using a generic notice similar to category four in the proposed order in the *ITT*/Chile case. Use of the generic category, however, would avoid compromising Ms. A's status as a CIA source by not providing this specific classified information to the defendant or confirming any suspicions the defendant may have had regarding Ms. A's relationship with the CIA.

The practical operation of the generic category notice would occur as follows. In the example referred to above, the government would provide the defendant with the four generic categories and request a hearing on any information that the defendant wanted to disclose at trial that fell within the categories. If the defendant responded that there was no such information, the government could proceed to trial with substantial confidence that classified material coming within the categories would not be disclosed.[14] Where the defendant indicated, for example, that there were three persons it would show were CIA sources—Ms. A, Mr. B, and Mrs. C—the government could have a hearing on some or all of those identifications without itself stating or confirming that any of the individuals were actually CIA sources.[15]

In order to insure that the government does not use the generic notice option as a discovery device to obtain disclosure of non-classified information that the defendant would use at trial, H.R. 4736 provides that the court shall approve the generic categories employed by the government. The requirement of judicial review will permit the court to guard against overly broad categories and to insure that there is a bona fide reason not to provide the defendant with notice of the specific classified information of concern to the government. The generic category clearly must be specific enough to enable the defendant to make an informed argument as to relevance.

(*f*) *Examination of Witness*

This subsection is intended to act as a back-up, or supplement, to the provisions which require an advance, *in camera* determination of the admissibility of classified information, in a situation where such provisions will not effectively address the practicalities involved. The subsection is intended to insure that classified information which has not previously been determined to be admissible is not disclosed by the response of a witness until the appropriate ruling is made. The government, during the examination of a witness by the defense, may object to any question or line of inquiry it believes will produce such a response. The court is then required to "take such action to determine whether the response is admissible as will safeguard against the disclosure of any classified information."

[13] *United States* v. *Berrellez*, *supra*.

[14] It is, of course, possible that the defendant in some instances might not realize that the information came within the generic category. This is a practical risk that the government would have to evaluate in deciding whether to use the generic category notice option.

[15] If Ms. A was an agent but Mr. B and Mrs. C were not, the government would not be required to limit the hearing to Ms. A since that would tend to confirm that Ms. A was in fact an agent and would defeat the purpose of the generic notice provision.

The phrase "take such action to determine" refers to the procedures to be employed, not to any change in the standard for admissibility. In most cases, "such action" will entail holding an *in camera* proceeding to determine admissibility, at which all the other provisions of the bill designed to prevent the needless disclosure of classified information would apply. Thus, for example, the government could make use of the generic category option of section 102(e) and the alternate disclosure procedure of section 103.

Section 103

This section, which comes into operation after all the determinations under section 102 have been made, but before the classified information is disclosed, provides a mechanism under which the court may prevent the needless disclosure of classified information in circumstances where an alternative to the disclosure of specific classified information will be of equivalent use to the defendant.

(a) Motion for Alternative Form of Disclosure

Subsection (a) authorizes the government, after the court, pursuant to section 102, has held that specific classified information is admissible, to request that the court nevertheless order that, rather than disclose the specific information, the defendant accept as a substitute (1) a statement admitting relevant facts that the specific classified information would tend to prove, or (2) a summary of the specific classified information.

The court must hold a hearing on any such request, which must be conducted *in camera* at the request of the Attorney General. The court may grant the government's request only if it finds that "the statement or summary will provide the defendant with substantially the same abiilty to make his defense as would disclosure of the specific classified information." A denial of a government request under this provision is immediately appealable under section 108.

This standard has been carefully crafted and is intended to insure that the defendant's case is not adversely affected because classified information is involved. The Committee expects the court to pay particular attention to the language chosen for the statement or summary. Basically, the government's request should be granted in those circumstances where the use of the specific classified information, rather than the statement or summary, is of no effective importance to the defendant.

For example, where it may be necessary or relevant for the defendant to offer evidence to show that he or someone else had access to nuclear missile data, the government's admissions of that fact should be a sufficient substitute for the actual production of the missile specifications themselves. Or, the admission that a CIA officer ordered the defendant or someone else to do something, should be a sufficient substitute in most cases for the name of the officer.

Some witnesses before the Subcommittee on Legislation questioned the constitutionality and the fairness of this provision, arguing that the defendant and his counsel, not the court, must deal with the questions of the effective use of relevant evidence. Supreme Court Cases were cited in which, in varying contexts, the Supreme Court supported this argument.[16] For example, in *Dennis* v. *United States*, 384

[16] See *Jencks* v. *U.S.*, 353 U.S. 657 (1957); *Alderman* v. *U.S.* 394 U.S. 165 (1969).

U.S. 855, 874–75 (1966) the court said:

> Nor is it realistic to assume that the trial court's judgments as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determinations of what may be useful to the defense can properly and effectively be made only by an advocate.

The Committee devoted a good deal of scrutiny to section 103, in light of these quite plausible arguments, in order to insure that the provision is both constitutional and fair. As introduced, section 103 authorized alternate disclosure "if the defendant's right to a fair trial [would] not be prejudiced thereby". The Committee amended the provision so as to make it clear that alternate disclosure was to be allowed only if the court found that it was, in effect, equivalent disclosure. As to the constitutional arguments, it is to be noted that the cases cited all involve instances where the defense had had no access to the information and the court's determination was based on *ex parte* consideration. Section 103, on the other hand, contemplates a full adversary hearing in regard to information already possessed by the defendant. Therefore, the defense will be involved in the determination of what may be useful to its case.

(*b*) *National Security Argument by the Government*

Section 103(*b*) authorizes the government to make an *ex parte* written submission to the court explaining the national security sensitivity of the specific classified information involved. Such submission is not intended to sway the judge's deliberations as to the adequacy of the proposed statement or summary; rather it is intended as a predicate for requesting such substitutes and as an aid to the court in understanding the language chosen for the summary or statement. The *ex parte* submission is not intended to detract from the defense's ability to fully argue the inadequacy of the substitutes.

It should be noted that it is at the time of a section 103 motion that the government will be able to fully explain why the information involved is classified and why its disclosure would damage the national security. This is to insure that the prior ruling on admissibility is based on legal issues, not on national security issues. Thus, to reiterate, the Committee intends that the admissibility rulings required by section 102 be prior to and distinct from the ruling on a section 103 motion.

Section 104

This section directs the court, when it has ruled against the defendant in an *in camera* proceeding, to seal and preserve the record of the proceeding for use in the event of an appeal. This will insure that the appellate court has the full record before it, while preventing its unauthorized disclosure.

Section 105

This section serves two purposes: it insures that classified information is not disclosed in connection with the trial until the government has had a final opportunity to choose to suffer an adverse decision in

connection with the prosecution rather than permit disclosure; and it makes clear that when the defendant is precluded from introducing relevant evidence, the remedy does not always have to be dismissal of the entire indictment or information.

The provisions of section 105 contain the third of the three district post-discovery procedures established by the bill to screen classified information. The first such screening occurs pursuant to the "pre-trial notice/*in camera* proceeding" provisions of section 102. If classified information is found to be admissible at a section 102 proceeding, the government can make a section 103 motion requesting that the defendant be ordered to disclose a summary of the classified information or a statement admitting certain facts—rather than disclose the specific information. If the court denies a section 103 motion, then section 105 comes into play.

(*a*) *Non-Disclosure Order*

Section 105(*a*) states that whenever the court denies a section 103 motion (i.e., rules that the defendant is entitled to introduce the specific classified information which has been found to be admissible, rather than a summary or stipulation), and the Attorney General files an affidavit objecting to disclosure, the court shall order the defendant not to disclose it.[17]

(*b*) *Remedy for Non-Disclosure Order*

Section 105(*b*) is the necessary corollary to section 105(a). The question posed is what result should ensue when the defendant is denied the use of relevant, admissible evidence because it is classified. The Committee assumes that often the result will be dismissal of the case.

However, the Committee recognizes that there may exist some circumstances when the interest of justice may not require dismissal. Therefore, upon such a determination, the court is authorized to take other remedial action. For example, if appropriate in a particular case, the court, instead of dismissing the whole case, may dismiss specific counts of the indictment or information, find against the United States on any issue to which the excluded information relates, or strike or preclude all or any part of the testimony of a witness. An order under this provision is immediately appealable by the government under section 108.

The appropriateness of a particular alternative remedy will depend in large measure on the severability of the excluded evidence, and the court's determination should be so focused. Essentially, what the court must determine when applying section 105(b) is whether or not the excluded evidence can be said to have a bearing on *only* a particular aspect of the case, such as on one count, or on the testimony of a particular witness, or on establishing a particular fact.

However, what must be emphasized is that a determination under section 105(b) is in no manner intended to be the result of a balancing test where the national security interest is weighed against the degree of importance the excluded evidence bears to the defendant's case.

[17] As the discussion accompanying section 102(a) notes, generally, such order may only extend to disclosure in connection with the trial if it pertains to classified information not obtained by the defendant through the court's processes.

Section 106

This section provides the means for enforcing the advance notice requirements placed on the defense by section 102. If the defense fails to comply with such requirements and the court finds that "the need to disclose or cause the disclosure of the classified information at issue reasonably could have been anticipated . . ." the court may order the defendant not to disclose the information or question a witness about it.

It is to be emphasized that the sanctions authorized by this section are not automatic. The trial judge, in addition to the extent to which the defense could have foreseen the need to use classified information, should take into account such factors as the importance of the information to the defendant's case, the national security sensitivity of the information, and the likelihood of the government discontinuing the prosecution rather than accepting disclosure.[18] As with other decisions or orders authorizing disclosure of classified information, an order authorizing disclosure under this provision is immediately appealable by the government under section 108.

Section 107

Section 107 deals with the issue of reciprocity, i.e., what advance disclosures the government should make to the defendant because of the advance notice the defendant is required to provide the government.

The central provision of H.R. 4736 is the requirement that the defendant give pre-trial notice of all the classified information or evidence he intends to use during trial. Such a requirement is a departure from existing federal criminal procedure. At present, a defendant is only required to provide such notice in four particularized instances:

(1) Under Rule 16 of the Federal Rules of Criminal Procedure, if a defendant seeks to discover documents in the possession of the government, he must allow the government to discover documents in his possession which he intends to use at trial.

(2) Under Rule 12.1 of the Federal Rules of Criminal Procedure, if a defendant intends to use an alibi defense he must notify the government of such intent prior to trial and state the place the defendant claims to have been at the time of the offense and the names of the witnesses he is going to use to prove it. In return, the government must give advance notice to the defendant of the names of the witnesses it will use to place the defendant at the scene of the crime and the witnesses it will use to rebut the defendants' alibi witnesses.

(3) Under Rule 12.2 of the Federal Rules of Criminal Procedure, if a defendant intends to use an insanity defense, he must notify the government of such intention prior to trial.

(4) Under Rule 412 of the Federal Rules of Evidence, if a rape defendant intends to offer evidence of specific instances of the complainant's past sexual conduct, the government must be notified prior to trial.

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[18] It should be noted that the issue specifically left undecided in *Wardius* v. *Oregon*, 412, U.S. 470 (1973), the enforceability of a rule precluding defense testimony if pre-trial notice of an alibi has not been given, has still not been decided by the Supreme Court. However, several federal courts have upheld such rules and it seems unlikely that the court would uphold pre-trial notice provisions, as it has, but reject the means for enforcing such provisions. In any evnt, provisions similar to section 106 are contained in Rules 12.1 and 12.1 of the Federal Rules of Criminal Procedure.

The two relevant Supreme Court cases (*Williams* v. *Florida*, 399 U.S. 78 (1970) and *Wardius* v. *Oregon*, 412 U.S. 470 (1973)), dealt with state statutes requiring notice of an alibi defense. In one the court upheld such a requirement noting that reciprocity was required of the government; in the other a conviction was overturned because reciprocity was not required. (Reciprocity is required of the government by Rule 12.1; it is not required by Rule 12.2, presumably because only a theory of defense, not specific evidence, must be disclosed; nor is it required by Rule 412.)

Section 107 is based on the beliefs that the principles of *Wardius* and *Williams* are applicable to the kind of notice required by H.R. 4736 and that, regardless of the constitutional issue, simple fairness mandates that the government not be given an undue advantage because the defense must disclose a portion of its case before trial.

(*a*) *Disclosure of Government Evidence and Witnesses*

Section 107(*a*) takes effect after the defendant has given advance notice of an intent to disclose classified information and only after the court has ruled such information admissible. At such time, the court must:

(1) order the United States to provide defendant with the information it expects to use to rebut the particular classified information at issue; and

(2) order the United States to provide the defendant with the name and address of any witness it expects to use to rebut the particular classified information at issue if, taking into account the nature and extent of the defendant's disclosures, the probability of harm to or intimidation or bribery of a witness, and the probability of identifiable harm to the national security, the court determines that such order is appropriate.

Considerable debate took place within the Committee on the provision dealing with advance disclosure of the identities of government witnesses. As introduced, the reciprocity provision of H.R. 4736 mandated automatic, advance disclosure of the identities of government witnesses to be called to rebut the classified information disclosed in advance by the defendant. However, it was pointed out that such disclosure might lead to attempts to injure, bribe or intimidate a witness, or might injure the national security by requiring the government to identify an undercover agent in circumstances in which the agent is a potential witness but the government hopes not to call him or has not yet decided whether to call him. In addition, the Department of Justice contended that principles of reciprocity only required that the government disclose the name of a witness in advance of his testimony if the defendant, in arguing for admissibility pre-trial, was compelled to disclose the name of a witness.

The language of section 107(a)(2), as reported, responds to these considerations. It leaves disclosure of the names of government witnesses to the discretion of the trial judge, but establishes the considerations which are to guide the exercise of such discretion. Generally, the Committee expects that the court will order the government to disclose the names of its witnesses in advance only where the defense has done so as an integral part of arguing its case. However, it is recognized that circumstances might exist in which, because the defendant's pre-trial disclosure of information has been so extensive or

of such a crucial character, the balancing of equities would require government disclosure of the names of its witnesses in the absence of such disclosure by the defense.[19]

(*b*) *Sanction for Failure to Comply with Order*

Section 107(*b*) parallels sections 106 and authorizes the court, if the government fails to comply with a disclosure order issued pursuant to 107(a), to exclude the evidence or testimony at issue. An order under this provision is appealable by the government under section 108.

(*c*) *Bill of Particulars*

Section 107(*c*) is intended to insure that the defense is able to make an informed argument, pre-trial, as to the relevance of the classified information to be used during trial. In many cases, it may be difficult to determine in advance, out of the trial context, what the particular relevance of information will be. Such difficulty will always be a side effect of procedures requiring pre-trial determination of admissibility. However, the difficulty can be alleviated somewhat if the government is required to provide more of the details of the charges against the defendant. Therefore, the subsection requires the government, when it requests a pre-trial proceeding under section 102, to "provide the defendant with a bill of particulars as to the portions of the indictment or information which the defendant identifies as related to the classified information at issue in the pre-trial proceeding."

Currently, under Rule 7(f) of the Federal Rules of Criminal Procedure, the court "may" order that the defendant be provided with a bill of particulars. Section 107(c) requires that such a bill be provided. The Committee recognizes that the bill of particulars was not intended as a discovery device and that the usual standard to be met is whether a bill of particulars is necessary to the preparation of the defendant's case. Therefore, theoretically, the term "bill of particulars", may not be totally apposite to the context of the legislation. The Committee is persuaded, however, that the term is appropriate to convey to the bench and bar what is intended. Generally, the defendant should be provided with sufficient information about the charge so that he can make an informed argument, prior to trial, as to what relevance classified information will have to trial issues. It will be up to the court to determine, in each case, the scope of the bill of particulars ordered and the sufficiency of the bill submitted by the government.

(*d*) *Exception to Reciprocity*

Section 107(*d*) was not contained in the bill as introduced. It was adopted by the Committee in response to the testimony, before the Subcommittee on Legislation, of Assistant Attorney General Heymann. Mr. Heymann pointed out that in some instances the then existing reciprocity provision would go beyond its purpose of balancing the effects of required pre-trial disclosures because the government would have to comply with the provision even though the informa-

[19] Pre-trial disclosure of the names of witnesses is not a novel concept in the criminal law. In 1974, the Supreme Court included in its proposed changes to the Federal Rules of Criminal Procedure a provision, which would have been part of Rule 16, requiring such disclosure by both the Government and the defense. Though the House adopted the provision, the Senate did not, and the House receded to the Senate in conference. At the time of the proposal, 22 States required pre-trial witness disclosure. See House Report 94–247.

tion "noticed" in advance by the defendant had been obtained from the government through discovery.

Subsection (d) states that the reciprocity provisions should not apply automatically in the case of classified information provided by the government to the defense, unless the interests of fairness so require. Thus, for example, where the defendant, in arguing pre-trial for the admissibility of discovered information, discloses significant additional information, reciprocity would still be required "in the interest of fairness". Similarly, a bill of particulars may be required "in the interest of fairness" if necessary to an informed argument on the admissibility of the discovered classified information.

Section 108

This section authorizes the government to take interlocutory appeals from adverse district court decisions requiring or authorizing the production, disclosure, or use of classified information, imposing sanctions for non-disclosure of classified information, or denying the issuance of a protective order. At present, the government is powerless to appeal such orders and therefore is unable to obtain appellate review of important district court rulings. Instead, the government must either compromise national security information by permitting its disclosure during the course of the prosecution or withhold the information and jeopardize the prosecution.

Congress has empowered the United States to appeal orders of a district court suppressing or excluding evidence in a criminal case where the United States Attorney certifies that the appeal is not taken for purposes of delay and that the evidence is substantial proof of a fact material in the proceeding. *See* 18 U.S.C. section 3731. Authorization of interlocutory appeals of orders requiring the disclosure of classified information is warranted since such orders generally have even more dramatic impact on a prosecution than suppression rulings. This section limits the government's interlocutory appeal rights to those situations where the Attorney General, Deputy Attorney General, or designated Assistant Attorney General certifies to the district court that the appeal is not taken for purposes of delay.

While it is expected that most issues will be resolved by rulings prior to trial and thus most interlocutory appeals will be taken prior to trial, the section permits interlocutory appeals to be taken during trial and contains provisions to insure that such appeals will be resolved quickly to avoid disruption of the trial. The procedures for interlocutory appeals during trial are patterned closely on provisions of the District of Columbia Code adopted by Congress in 1970. *See* D.C. Code section 23–104.

(*a*) *Authorization to Appeal*

Section 108(*a*) authorizes interlocutory appeals by the government, before or during trial, from adverse decisions involving the disclosure of classified information.

(*b*) *Expedited Decision*

Section 108 (*b*)(*1*) requires a pre-trial appeal be taken within 10 days of the decision or order appealed from, and stays the beginning of the trial until the appeal is decided.

Section 108(b)(2) directs the trial court, in the case of an appeal taken after the trial has begun, to adjourn the trial until the appeal is resolved. The Court of Appeals is directed to hear argument within 4 days of the adjournment of the trial and to render a decision within 4 days of argument. The Court of Appeals is permitted to dispense with the requirement for written briefs and a written opinion.

(*c*) *Post Conviction Appeal*

Section 108(c) makes clear that in a post conviction appeal the defendant is entitled to have the Court of Appeals hear issues which have been decided adversely to the defendant by a Court of Appeals in an interlocutory appeal.

Section 109

Section 109 contains those specific provisions designed to prevent the unnecessary disclosure of classified information during discovery or similar processes and during the actual trial process.

(*a*) *Protective Order*

Section 109(a) directs the court, upon motion of the government, to issue an order for the protection against unauthorized disclosure of classified information disclosed by the government to the defendant. The provision is intended to codify the well established practice, based on the inherent authority of federal courts, to issue protective orders. Such orders are usually associated with the discovery process. Subsection (a) makes it clear that protective orders are to be issued, if requested, whenever the government discloses classified information to a defendant in connection with a prosecution, e.g., Brady and Jencks material. The details of each order must be fashioned by the trial judge according to the circumstances and needs of the particular case. In appropriate cases it is expected that the terms of an order may include, but need not be limited to, provisions—

(i) Prohibiting the disclosure of the information except as authorized by the court;

(ii) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

(iii) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(iv) Requiring the maintenance of logs recording access by all persons authorized by the court to have access to the classified information in connection with the preparation of the defense;

(v) Regulating the making and handling of notes taken from material containing classified information; and

(vi) Authorizing the assignment of Government security personnel and the provision of Government storage facilities.

A court refusal to issue a protective order, and the suffiency of such an order, are immediately appealable by the government pursuant to section 108.

(*b*) *Discovery of Classified Information*

Section 109(b) is similar to the alternative disclosure provisions of section 103, though it would operate in a different context. Under section 103, if the court finds that the defendant will be left with substantially the same ability to make his defense, the court may order the

defendant to disclose, instead of the specific classified information found to be admissible, a summary of such information or a statement of the government admitting the facts the information tends to prove. Section 109 on the other hand, applies to the pre-trial discovery process. Once, pursuant to existing discovery rules, the court has ruled that the defendant is entitled to discover or inspect classified information, the court may authorize the government to delete specified items of classified information from the material to be made available to the defendant, to substitute a summary of it, or to substitute a statement of facts that the information would tend to prove—if the court finds that such action will provide the defendant with substantially the same ability to prepare for trial or make his defense as would disclosure of the specific information. A court order requiring discovery of classified information, or a decision refusing to authorize substitute disclosure, are immediately appealable by the government under section 108.

Generally, under Rule 16 of the Federal Rules of Criminal Procedure, the defendant is entitled to discover, among other items, all documents in the possession of the government which are "material to the preparation of his defense" or which "are intended for use by the government as evidence in chief at the trial." Rule 16(d)(1) provides that "upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate."

There is, however, a dearth of case law interpreting Rule 16(d)(1) or illuminating what "showing" the government must make in order for it to be "sufficient". In particular, it is unclear whether the standard requires a balancing of defense and prosecution interests, or simply imposes unilateral burden of proof upon the government.[21] The "Notes of the Advisory Committee on Rules" in connection with the 1966 amendments, while discussing then subsection (e) (later (d)(1)), did list the following considerations to be taken into account by the court: (1) the safety of witnesses and others, (2) a particular danger of perjury or witness intimidation, (3) the protection of information vital to the national security, and (4) the protection of business enterprises from economic reprisals.

Section 109(b) is not intended to affect the discovery rights of a defendant. Rather, it is a recognition that existing discovery provisions may be unclear when classified information is involved. Therefore, it is intended to back up existing procedures, and take effect only after discovery of classified information has been ordered, pursuant to Rule 16. The standard established is the same as provided in section 103, and should also be construed so that the defendant will be left in substantially the same position in which he would have been if discovery of the specific classified information had been allowed.[22]

[21] See *U.S.* v. *Pelton*, 578 F.2d 701 (8th Cir.), *cert. denied* 99 S. Ct. 451 (1978); *U.S.* v. *Lamont*, 565 F.2d 212 (2d Cir. 1977), *cert denied* 98 S Ct. 1467 (1978).

[22] The Committee would also point out the substantial difference in the contexts in which section 103 and section 109(b) are found. In section 103, the government is trying to prevent the public disclosure of classified information already determined to be relevant and admissible. the defendant has possession or knowledge of such information, and the hearing on the motion is adversarial. Under 109(b), since the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules. The lack of such a hearing is in accord with current practice. Discovery is statutorily based, not constitutionally required, and, theoretically, can be completely denied upon a sufficient *ex parte* showing. Therefore, though the standards for alternative disclosure found in section 103 and 109(b) are the same, an adversary hearing is not crucial to acceptance of the latter.

(c) Introduction of Classified Information

Section 109(c) states that documentary materials need not be declassified in order to be placed in evidence, as some federal courts have required.

This provision is not intended to have any affect whatsoever on how classified information which is introduced into evidence is handled at the trial. Rather, it recognizes that classification is an executive function, not a judicial function, and primarily effects how the government will treat the information after trial. The subsection would allow the classifying agency to determine after trial whether the information has been so compromised during trial as to require declassification. Under present procedure, the information is first declassified and the government, if the information has not been publicized during trial, is forced into the difficult position of attempting to reclassify it.[23]

(d) and (e) Rule of Completeness

These subsections deal with a traditional rule of evidence, now codified in Rule 106 of the Federal Rules of Evidence, known as the Rule of Completeness.

Rule 106 states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

According to the Advisory Committee on Proposed Rules of Evidence:

> The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in trial.

If applied as its drafters intended, the rule would seem to require the court to make two determinations: (1) is the part of the writing, or the related writing, which is not introduced relevant to proving what was sought to be proved by the part or writing that was introduced; (2) if so, does fairness require that it all be introduced at one time?

In actual practice, however, a Rule 106 motion is frequently granted as a matter of routine. Thus, in espionage trials, the government is faced with the requirement of introducing all of a classified document that has been transmitted by the defendant, rather than just introducing enough of the document to prove that it is related to the national defense, or introducing all of a document though only part of it has been transmitted by the defendant.

The Department of Justice sought to solve the perceived problem with the following language:

> The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding,

[23] The Committee is aware that considerable controversy exists within the legal community as to whether information which is part of a trial record can be withheld from the public after trial. The Committee does not take a position on the issue.

> may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein.

The Committee concluded that such a provision, containing no standards and granting blanket authorization to make deletions, was not justified; and that sections 109 (d) and (e) provide an adequate solution.

Section 109(d) restates the Rule of Completeness, but, if classified information is involved, requires the court to hold an *in camera* hearing to determine if the material not introduced was relevant and, if relevant, to determine whether fairness requires that it be introduced contemporaneously. If the court orders introduction, then the provisions of section 103, which allow classified information to be introduced in summarized form, would apply.[24]

In addition, section 109(e) allows the government to find out pretrial if it will be able to introduce only part of a document during trial. The government was provided such an opportunity in the 1978 espionage trial, in the Northern District of Indiana, of William Kampiles. Kampiles, a former CIA employee, was charged with taking a classified manual pertaining to a reconnaissance satellite from the CIA and selling it to the Soviets. The Manual, with deletions, was introduced in the Kampiles case, but without objection of the defendant. Section 109(e) would give the government an opportunity to ask the court to allow such deletions over objections of the defendant. Decisions adverse to the government under subsection (d) or (e) are immediately appealable under section 108.

Section 110

This section addresses the need for the development of adequate procedures to protect against the compromise of classified information submitted to the Federal Courts. Such information may be disclosed in original documents submitted to the court, in briefs and pleadings, during oral argument, or through testimony. At present the handling of such materials is often through *ad hoc* arrangements developed in each case. Section 110 calls for the formulation of uniform security procedures for the protection of classified information submitted to the federal courts.

(*a*) *Promulgation of Procedures*

Section 110(a) directs the Chief Justice, in consultation with the Attorney General and the Director of Central Intelligence, to promulgate the security procedures within 120 days of enactment of the bill. The procedures are to apply to all district courts, courts of appeal and the Supreme Court. The procedures, and any later changes, are to be submitted to Congress and shall not take effect until 45 days after such submission.

[24] It should be emphasized that neither Rule 106 nor this provision preclude the defendant from attempting to introduce on his own the particular information the government does not want to introduce. Any such attempt would be governed by the other provisions of this bill.

(b) Interim Procedures

This subsection directs each federal court to adopt its own security procedures pending the effective date of the 110(a) procedures.

The Committee wishes to emphasize that the security procedures required by section 110 are meant to deal with such matters as how and where classified documents are to be stored, what court personnel will have access to them, security clearances for court personnel, and related matters. Issues of particular effect on the trial process and the rights of defendants, such as defense access to classified materials, are to remain within the province of the individual trial judge and the judge's authority to issue protective orders.

Section 111

This section affects those prosecutions under the espionage laws and similar statutes in which the government, as an element of the offense, must prove that the information upon which the prosecution is based is classified or relates to the national defense. Where, in such cases, the government intends to rely on only a part of the information in making its proof, it must so notify the defendant prior to trial.

Section 112

This section authorizes the Deputy Attorney General or a predesignated Assistant Attorney General to exercise the functions given to the Attorney General under Title I. Under Title I, the Attorney General must petition the court for a section 102 *in camera* proceeding, is the affiant for purposes of sections 103(b) and 105(a), and makes the certification required by section 108(a).

The section insures that a high level official will be responsible for the decisions to be made, without unduly burdening the Attorney General.

It is to be emphasized that for purposes of section 201 and 202, "Attorney General" refers only to the Attorney General.

Section 113

This section defines the terms "classified information" for purposes of the bill. The definition determines the scope of the information subject to the procedures contained in the bill. The definition of "classified information" is intended to encompass all information determined pursuant to executive order, statute, or regulation to require protection for reasons of national security. In order to avoid any uncertainty, "restricted data", as defined in the Atomic Energy Act of 1954, is specifically included within the definition of "classified information". The section is written in general terms so as to encompass both the present executive order governing classified information (Executive Order 12065) and any executive orders, statutes, or regulations supplementing or superseding the present executive order.

Section 201

This section directs the Attorney General to issue, within 90 days of enactment, guidelines detailing the factors to be considered by the Department of Justice in deciding whether to prosecute a case in which there is a possibility that classified information will be disclosed. The guidelines are to be transmitted to the appropriate committees of Congress.

The Committee does not intend that those guidelines be subject to judicial review; they are not intended to confer any new rights on defendants.

Section 202

This section directs the Attorney General to report to the House and Senate Intelligence Committees annually on the operation and effectiveness of the legislation. The report must include summaries of those cases in which indictments were not sought or prosecutions were dismissed because of the possibility that classified information would be disclosed.

Until relatively recently, one of the primary obstacles in the path of successful prosecution of cases involving classified information had nothing to do with defense possession of, or threats to disclose, classified information. Rather, a lack of cooperation, and constant tension between the Justice Department and intelligence agencies blocked any effort to fashion a coherent policy to effectively deal with the "disclose or dismiss" dilemma. During this period, many cases of seeming prosecutorial merit were not pursued to the indictment stage, or were dismissed after indictment, with no plausible reason given for such action. Consequently, whether or not it was always or even ever true, a climate existed in which charges of abuse and cover-up were easy to make and easy to believe. Needless to say, the documented result was neither the fair, nor the efficient, administration of justice.[25]

Two of the many lessons learned from these times are that decision-making in this area must be guided by regularized procedures and that vigilant congressional oversight must always be maintained.

Consequently, the Committee believes that sections 201 and 202 are extremely important parts of the legislation. When introduced, the reporting provision was much more complex: it required the Justice Department to make detailed written findings as to each decision not to prosecute and to report the findings, along with the classified information involved and the likelihood and consequences of its disclosure, to the House and Senate Intelligence Committees not more than 30 days after the decision was made.

The Justice Department argued strenuously against the provision—primarily on the grounds that it violated the separation of powers doctrine and interfered with the exercise of prosecutorial discretion. In deference to the strongly held views of the Department on this matter and in light of the immediate need for remedial legislation, the reporting provision was amended. However, the Committee wishes to emphasize its commitment to be kept fully informed of both the

[25] See, "Justice Department Treatment of Criminal Cases Involving CIA Personnel and Claims of National Security", Hearings before a subcommittee of the Committee on Government Operations, House of Representatives, 94th Congress, 1st Session, July 22, 23, 29, 31, and August 1, 1975; "Justice Department Handling of Cases Involving Classified Data and Claims of National Security", Hearings before a subcommittee of the House Committee on Government Operations, 95th Congress, 2d Session, 1978; "Justice Department Handling of Cases Involving Classified Data and Claims of National Security", Second Report by the Committee on Government Operations, House of Representatives, 1979 (H. Rept. 96–280); "The Use of Classified Information in Litigation", Hearings before the Subcommittee on Secrecy and Disclosure of the Senate Select Committee on Intelligence, 95th Congress, 2d Session, March 1, 2, 6, 1978; "National Security Secrets and the Administration of Justice", report of the Senate Select Committee on Intelligence, 95th Congress, 2d Session, 1978; and "Graymail Legislation" Hearings before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 96th Congress, 1st Session, August 7 and September 20, 1979.

reasons for which, and the process by which, decisions not to prosecute cases involving classified information have been made. The Committee endorses, as a foundation for that process, what it understands to be the current practice: (1) The Attorney General, subject only to an appeal to the President, is the Executive Branch official responsible for deciding when to prosecute a case involving national security information; (2) The Attorney General is entitled to have access to all relevant intelligence agency files; (3) All matters involving national security interests which come to the attention of United States Attorneys are immediately forwarded to the Department of Justice.

If this practice is maintained, if the section 201 guidelines are carefully drawn and strictly adhered to, and if inter-agency cooperation continues, the passage of this legislation should be the additional factor necessary to reinstating public confidence in the administration of justice where national security information is involved.

Section 301

Section 301 contains the bill's effective date. The provisions of the bill are to take effect immediately upon enactment. However, none of the provisions are to apply to any prosecution in which an indictment or information was filed prior to enactment.

COMMITTEE POSITION

On February 12, 1980, the Permanent Select Committee on Intelligence, a quorum being present, approved H.R. 4736, as amended, by voice vote and ordered that it be reported favorably.

OVERSIGHT FINDINGS

With respect to clause 2(1)(3)(A) of Rule XI of the Rules of the House, the Committee notes that it held public hearings on the way in which prosecutions involving classified information have been conducted, the problems faced by the government in such prosecutions, what remedies ought to be provided to afford the government a clear understanding, before trial, of what classified information is likely to be disclosed and how defendants' rights to fair trials can be guaranteed. The Committee findings in these regards have resulted in its recommendation that new legislation (H.R. 4736) be enacted. The Committee reasoning for the changes it recommends are explained more fully in the body of this report.

CONGRESSIONAL BUDGET ACT

Pursuant to clause 2(1)(3)(B), the Committee notes that this legislation does not provide for new budget authority or tax expenditures.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 2(1)(3)(c) of Rule XI of the Rules of the House, the Committee notes that, as of the filing date of this report, the Committee had received no estimate from the Congressional Budget Office under Section 403 of the Congressional Budget Act.

RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

The Committee had not received a report from the Committee on Government Operations pursuant to clause 2(1)(3)(D) of Rule XI of the Rules of the House as of the time of the filing of this report.

INFLATION IMPACT STATEMENT

Pursuant to clause 2(1)(4) of Rule XI of the Rules of the House, the Committee has examined H.R. 4736 to determine if it will have inflationary impact on the national economy. Consistent with the Committee's determinations as to the cost of H.R. 4736, the Committee finds that enactment of H.R. 4736 will have no effect on the national economy.

CHANGES IN EXISTING LAW

Pursuant to clause 3 of Rule XIII of the Rules of the House the Committee notes that the bill makes no changes to existing law.

FIVE YEAR COST PROJECTION

Pursuant to clause 7(a)(1) of Rule XIII of the Rules of the House, the Committee has determined that no additional costs will be incurred by the Government in the administration of H.R. 4736.

EXECUTIVE BRANCH ESTIMATE

The Committee has received numerous comments from various Government agencies whose activities would be affected by H.R. 4736. However, the committee has never received any cost estimates from the Government and is therefore unable to compare the Government's costs to its own estimate pursuant to clause 7(a)(2) of Rule XIII of the Rules of the House.

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